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No. 86-1976

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1987

WILLIAM J. BRIGGS, Petitioner

V.

INDIANA SUPREME COURT
DISCIPLINARY COMMISSION, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF INDIANA

REPLY BRIEF OF PETITIONER ADDRESSED TO RESPONDENT'S BRIEF IN OPPOSITION TO WRIT

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Table of Contents

Table of Contents.....i
Table of Authorities.....i
Reply Brief Starts.....1
Length of Delay.....2
Synopsis of Days Passed.....2
Prejudice and Harm
To Petitioner.....3
Stewart-Hughes Alleged
Agreement.....5
Assertion of Right.....8
Presumption of Prejudice
By Prolonged Delay.....9
Petitioner Raised Issues.....9
Court Ignored Issues.....10
Detailed Analysis
Cause of Delay.....11
Respondent's Admission
as to Delay.....14
Conclusion.....15
Table of Events.....17,18.19

Table of Authorities

Barker v Wingo
407 US 514, 33 L Ed 2d 101,
33 2d 101, 92 S Ct 2182 (1972).....2,8,15

Scott v. State
461 N,E. 2d 141, Ind.App. (1984).....9

Ind. R.A.D.23m Sec.24.....10

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Petitioner for Reply to Respondent's Opposition Brief says:

Respondent's position is that present case law does not make Speedy Trial Sixth Amendment Rights available in disciplinary cases. (Resp's Br.4,2d para.) It does not address the question: whether prolonged delay in disciplinary cases denies Due Process. A discussion of one without the other is incomplete.

The Barker v Wingo Speedy Trial Factors Applied to this Case

Barker v. Wingo 407 US 514, 33 L Ed 2d 101, 33 2d 101 at 117,92 S Ct 2182 (1972)

Length of Delay. Respondent avoided discussing the ten year delay from the 1977 grievance to the 1987 judgment by a one word response, "Given" which means admitted. (Resp's Br 4, 2nd line from bottom)

Indiana Disciplinary Rule 23, section 13 provides that a **trial is to be held within 60 days** on a disciplinary complaint after appointment of the Hearing Officer. In this Briggs case **over 2000 days passed between appointment of the first Hearing Officer and the trial**. Both the Court and the Disciplinary Commission completely ignored and grossly violated its own rule.

SYNOPSIS OF DAYS PASSED

number of days between events

-0-	1st H.O. appointed	(10-30-78)	(Ev5)
1025	1st H.O. died	(8-30-81)	(Ev11)
90	2nd H.O. appointed	(11-30-81)	(Ev12)
10	Briggs requests change	(12-9-81)	(Ev13)
75	3rd H.O. appointed	(2-24-82)	(Ev14)
865	Trial	(7-12-84)	(Ev25)

Prejudice and Harm to Briggs

Respondent claims there was no prejudice since there was ample time to preserve evidence, (Resp's Br. 6,para.1) There was no opportunity to preserve evidence as to certain charges because they were not made until after some evidence was lost. The Petition for Writ at Part H pages 55 through 64 sets out many examples of prejudice. Because of the denials of Harm by Respondent, examples are included here. Lost evidence because of delay was severe and irreparable. Three key witnesses and at least 20 others were lost. The facts covered almost a 20 year span and with few exceptions witnesses indicated loss of memory. Mr. Breskow of the Commission cited this problem, and Peitioner found it extremely difficult to remember exact details from so long ago. Examples of delay-caused prejudice are cited:

Mary Bernice Smoker (deceased). This former client should have been the principal grievant and witness. Her death in 1979 prevented any deposition after the amended complaint filed in 1983 or the 2nd amended complaint in 1984 or the trial in 1984. Briggs was found guilty of delay in termination of her guardianship which ended long before her death. The charges were not made until after she died. There was no opportunity whatsoever to preserve her testimony on some matters, but even in her deposition she could not remember making three rather than two wills.

Bertha Wolfe (elderly, ill and in Arizona). Mrs. Wolfe was a long-time secretary in the Briggs law office at the time the 1968 and 1970 Smoker wills were written. The complaint was amended in 1984, so that some charges were based upon the old-pre-1970 ABA Canons as to events between 15 and 20 years ago. There was no

opportunity to preserve evidence after the this last amended complaint. Mrs. Wolfe would have been invaluable in the Briggs defense where he was required to disprove that he did not make "full disclose" to Smoker -- under the extremely vague and uncertain standards of the old Canons. (See Petr's Br. 60 et seq) James Stewart, deceased. The Commission did not file the amended complaint until one month after the death of Mr. Stewart and his testimony was lost forever. He had interviewed Mr. Arthur Schenck who was the primary witness for the Commission on the charge (which was upheld) that Briggs communicated with others. Stewart's death prevented him from rebutting Schenck's testimony and his garbled version because of failing memory. Alleged Stewart-Hughes Agreement. Stewart could also have rebutted the claim that there was a Stewart-Hughes Agreement. Respondent's

allegation that the Petitioner, "caused the majority and condoned the remainder" of all delays which occurred up to July 21, 1983 (Resp's Brief 5, line 11) is based upon the uncorroborated oral claim of Attorney Hughes that he and James Stewart, attorney for Petitioner, had a private and unofficial agreement to wait until the end of the Smoker Civil Trials. (Resp's Br 5,line 12) There is no agreed entry or pleading signed or filed by Stewart in the records of the case at the Court.***If there had been such a private agreement between attorneys Hughes and Stewart, then most assuredly, Mr. Stewart as a careful attorney would not have made such an agreement without written authorization from his client. Briggs did not authorize it, and there is no written authorization.***And further if there had been such an agreement, then the Disciplinary Commission should have lived

up to it. But it did not. Smoker trials did not end until December 9, 1980, (Resp's Br. 5, para.1 Ev #10) yet the Commission proceeded on the basis that there was no such agreement when it wrote letters in July and September of 1979 to the First Hearing Officer to secure pretrial conference. The Commission wrote a second set of letters to the Hearing Officer again in 1980 and again proceeded as if there were no agreement. The four letters were made exhibits at the trial of the disciplinary case. (Petr's Exhs 92,93,104, & 105).***Event #17 shows members of the Commission directed Commission Secretary Breskow and Attorney Hughes to file an amended complaint on September 10, 1982. (Resp's Br 5, 2nd para line 3) At that time James Stewart was still alive. This important witness did not die until June, 1983. (Ev 18), and

shortly thereafter in July of 1983, the amended complaint was filed. Mr. Hughes waited for 10 months after he was authorized but then immediately after the death of Stewart filed it. (See Resp's Br. 5 2nd para line 4) (Events #17,18, & 19) James Stewart died before the trial, and thus he could not testify as to the veracity of the alleged agreement.

Assertion of the Right. No pleadings were filed by either the Disciplinary Commission or the Petitioner specifially requesting that the proceedings be expedited. (Pet 9,2d para.)

In Barker v. Wingo 407 US 514, 33 L Ed 2d, 101 92 S Ct 2182, the court stated, "...a defendant has no duty to bring himself to trial; the state has that duty..."and at 116 stated "the primary burden (is) on the courts and the prosecutor to assure that cases are brought to trial."

Presumption of Prejudice--Long Delay

Although a Petitioner may be seriously prejudiced by delay, he may not be required to prove it, since courts realize that he may not be able to do so. The Indiana Court of Appeals in Scott v State 461 N.E.2d 141 (1984) in adopting Barker at pages 143 and 144 said, "There is a general presumption against mere passage of time as prejudicing a defendant...However the delay may be so prolonged (that) the general presumption must fail and be replaced by a presumption of prejudice. The basis for the contrary presumption of prejudice is the delay itself deprives the defendant of the ability to prove prejudice."

Petitioner raised Delay, Speedy Trial Due Process Issues along with 1st Amendment Redress Rights in his Answer to the Amended Complaint filed in August, 1983. The Commission, the Court and the

Hearing Officer all totally ignored him. Realizing he was being ignored,Briggs filed a Petition with the Court and Hearing Officer on May 7, 1987. It requested a hearing and oral argument before the Court and Hearing officer on Rights issues. (Petition is at App.F-1 & Ev #22).

The Indiana Supreme Court entered a one page cursory Order of Denial.

Ind. R. A. D. 23, Sec. 24 provides, "...no motion to dismiss or dilatory motion shall be entertained...."

The cursory Order from the Indiana Supreme court treated the Petition relating to serious Constitutional Issues as a dilatory motion. (See App.F34) Petitioner Briggs never was permitted to have an oral hearing on Constitutional issues before the the Indiana Supreme Court. Even the Hearing Officer refused to bifurcate the Trial or allow a separate hearing on the

numerous Constitutional Issues raised. (App.F1 et seq) The trial was lengthy, and harried, under extreme time pressure, arose out of complicated issues and huge amounts of facts covering the last 20 years. It was difficult for the witesses as well as for lawyers to remember and cordinate facts and circumstances. Under these circumstances Petitioner was compelled to attempt to obtain consideration on Constitutional infirmities.

It was an act of futility. In short, it was unfair. Petitioner was denied a meaningful hearing on Constitutional Infirmities and a Due process guaranteed fair trial. The prolonged delay denied him the opportunity to make an adequate defense.

Cause of Delay--Detailed Analysis
With Reference to Table of Events

Respondent unjustifiedly alleged that Petitioner caused the majority of delays. Resp's Br.5 line 8).

The First Thirty-Three Months. The Grievance was filed with the Commission in July of 1977. (Ev.#1) The Complaint was filed with the court in October 1978. (Ev. #4) Briggs filed his Answer to the complaint in court 30 days later, November 24, 1978. (Ev.#6) The First Hearing Officer, Staffeldt, died on August 30, 1981. (Ev.#11) 15 months passed from Grievance to filing of the complaint and only 1 month passed until Briggs Answered the Complaint. This must be added to the 33 months from the Briggs Answer to the death of the Hearing officer. Already 49 months had passed. Respondent says that the only action taken by the commission during the 33 months period was the writing of two letters and discussions with attorney and client. (Resp's Br 2, under IV,para.1) Attorney Hughes says he suggested to his client that it attempt to obtain a new Hearing Officer. (Resp's Br 2

under IV). Discussions by an attorney with his own client do not constitute any official legal action. The Docket Sheet shows no activity. Respondent fails to show that it filed any pleading with the court during the 33 months period ending on August 30, 1981. (Resps's Br 2, under IV)

During the Thirty-nine Months. The first Hearing Officer died on August 30, 1981 (Ev.# 11) The vacancy was not filled by the Court until November 30, 1981 (Ev.#12 Briggs promptly filed for change of Hearing Officer about 10 days later on December 9,1981 (Event #13) The Court removed this Hearing Officer but did not appoint another until about 2 & 1/2 months later on Febrary 24, 1982. (Ev.#14) The Commission notified Briggs in June of 1982 that the 2nd set of grievances officially had been docketed for investigation by the Commission.

Briggs promptly filed on July 3, 1982 a Supplemental Response with the Commission. (Ev. #15 & 16) Members of the Commission did not meet until September 10, 1982 to authorize filing of an amended complaint. Even though its filing was authorized at that time, the complaint was not filed until about 10 months later on July 19, 1983. (Ev #17 & 19) . Petitioner objected to the court's setting off the trial from April 1984 to July 1984 and to joining husband and wife in one trial.

Respondent admits that the delay of 10 months (between September 10, 1982 when the complaint was authorized and July 19, 1983 when the complaint was actually filed) was caused by case workload and problems of Attorney Hughes. However he is not the only attorney for the Commission, and if he were dead, another attorney would have tried the case.

In the Barker concurring opinion 33L.E.2d 101 at 121, Justice White and Brennan state," unreasonable delay in run-of-the-mill criminal cases can not be justified by simply asserting that the public resources provided by the State's criminal-justice system are limited and that each must await its turn"

The documented facts show that Petitioner did not cause the majority of the delays. The facts show that the court and the Disciplinary Commission ~~and the Disciplinary Commission~~ should be held accountable for the over-all delay.

CONCLUSION

There is a need, and it is timely for the Court to accept a case dealing with Constitutional rights of lawyers.

This case contains questions of law which are of widespread interest, and the facts and prolonged delay with attendant prejudice make it appropriate for acceptance.

The petitioner respectfully requests the Court to accept this case and grant the writ in order to clarify the confusion in the Circuits and the States and assist in the building of a more certain body of rights for all lawyers in the United States

Respectfully Submitted

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TABLE OF EVENTS

(1) 7/8/77
Grievance filed at Commission

(2) 7/14/78
Commission authorized filing of complaint in Ind. Sup. Ct.

(3) 10/77
Deposition of Mary Bernice Smoker taken

(4) 10/24/78
Complaint filed in Ind. Sup. Ct.

(5) 10/30/78
First Hearing Officer (Staffeldt) appointed by Ind. Sup. Ct

(6) 11/24/78
Briggs filed Answer to Complaint in Ind. Sup. Ct.

(7) 7 & 9/1979
Commission wrote letters to Hearing Officer before Smoker litigation ended

(8) 11/21/79
Death of Mary Bernice Smoker

(9) 8 & 9/80
Commission wrote other letters to Hearing Officer before Smoker litigation ended

(10) 12/9/80
All Smoker trials ended after Commission wrote letters to Hearing officer

(11) 8/30/81
Death of First Hearing Officer (Staffeldt)

(12) 11/30/81
2nd Hearing Officer (Wright) appointed by Ind.Sup.Ct.

(13) 12/9/81
Briggs promptly filed within 10 days
Motion for Change of Hearing Officer

(14) 2/24/82
3rd and Final Hearing officer (Morton)
appointed by Ind. Sup. Ct

(15) 6/82
Ex. Sec. of Disciplinary Commission
notifed Briggs that 2nd set of grievances
filed by the same grievants had been
docketed (officially scheduled) for
investigation by Commission

(16) 7/3/82
Briggs promptly filed with Commission his
Supplemental Response to the 2d set of
grievances at Commission

(17) 9/10/82
Commission members authorized Ex.Sec.
Breskow and its attorney Hughes to file
amended complaint

(18) 6/83
Death of James Stewart, long time attorney
and important witnesses for William Briggs
and Florence Anne Briggs

(19) 7/19/83
Amended Complaint was filed about 1 month
after death of James Stewart but not until
10 months after it was authorized by
Commission Members (see Events #17 & #18)

(20) 9/19/83
Briggs filed Answer (Response) to Amended
Complaint at Ind. Sup. Ct. raising delay
and other Constitutional Issues requesting
Hearing

(21) 3/19/84
Briggs filed objection to Hearing Officer's grant of continuance setting off trial from April 24, 1984 to July 12, 1984.

(22) 5/7/84 (Appendix F-1)
Briggs filed Petition with Ind. Sup. Ct. and Hearing Officer raising Question of Delay and other Constitutional Issues and requesting Hearing and Oral Argument

(23) 6/4/1984 (Appendix F-34)
Ind. Sup. Ct denied Briggs Petition listed as Event #22.

(24) 6/84
2nd Amended Complaint filed against William Briggs about one month before trial commenced on July 12, 1984

(25) 7/12/84
Trial Started 7-12-84 and Ended on 8-30-84

(26) 1/18/85
Hearing Officer Morton filed Hearing Officer's Report with Ind. Sup. Ct. Both sides had agreed for Judge Morton to have additional time to make his report.

(30) 1/13/87
Judgment entered by Ind. Supr. Ct.